IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1388

ERLE E. PEACOCK, JR.,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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ARGUMENT

Respondents' Brief In Opposition is silent as to three of the four Questions Presented in the Petition. They are Nos. 1, 3 and 4 dealing with the *First Amendment* issue, the liberty interest issue, and the elements of due process issue. Nor have Respondents confronted the merits of the fourth issue, whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by suspension therefrom without prior notice or hearing of any kind.

The first reason assigned by Respondents as a ground for denying the writ is the simple conclusionary statement that the decision below does not conflict with any decision of the Supreme Court of the United States.

The second reason Respondents assign as a ground for denying the writ is their claim that the decision below does not conflict with *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972). That decision held that Dr. Hostrop, a college administrator who asserted protected interests entitled to due process procedural safeguards, was entitled to a hearing *before* being deprived of those interests, and that it was only in determining the *form* of that *prior* hearing that the interests of the state were balanced against the interests of the individual. Compare that holding with the decision below in which the Ninth Circuit held that in determining *whether* a person is entitled to a pre-deprivation due process hearing before his property interests are taken, his interests in receiving the hearing provided for in the *Fourteenth Amendment* must be balanced against the state's interests in denying him such a hearing. In the one case, *Hostrop, supra*, the right to the pre-deprivation hearing is affirmed and

in the second case, the decision below, the right to the pre-deprivation hearing depends on whether the interests of the state weigh heavier than the interests of the individual, a weighing game which most persons are going to lose.

Respondents attempt to distinguish *Hostrop, supra*, on two grounds.

The first is the argument that in *Hostrop, supra*, the complaint was dismissed by the trial court without a hearing so there was no basis upon which the trial court could balance the opposing interests whereas here the trial court heard evidence before it balanced such interests. But this merely highlights the fact that the trial court herein applied an incorrect rule when it balanced the interests of a state against the interests of an individual in determining *whether* a person is entitled to a pre-deprivation hearing rather than balancing those interests to determine the *form* of that pre-deprivation hearing. Furthermore, the distinction ignores the holding of *Hostrop, supra*, which means that had the trial court therein taken evidence and balanced the competing interests, it would have been compelled to do so only with respect to determining the form of the pre-deprivation hearing but it could not have so balanced interests to determine whether or not Dr. Hostrop was entitled to a pre-deprivation hearing.

Respondents' second asserted distinction is that in *Hostrop, supra*, the Seventh Circuit ordered a pre-termination hearing whereas here the trial court reinstated Dr. Peacock and granted him a pre-termination hearing, the report of which Respondents attached as Appendix B. This second distinction ignores the fact that Dr. Peacock was suspended, without notice and hearing, from his position as Head of the Department of Surgery within two hours after his reinstatement, and erroneously implies that one of the issues raised here was

whether Dr. Peacock could be deprived of a protected interest without a pre-termination or pre-dismissal hearing whereas Question Presented No. 2 and the thrust of the Petition with respect thereto is "whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by *suspension* therefrom without prior notice or hearing of any kind." It is no answer to the question of whether a *Fourteenth Amendment* protected interest can be taken by suspension therefrom without notice or hearing to say that after it was so taken, the offending state afforded that party a post suspension hearing which the state labels a pre-termination hearing.

It is clear therefore that the real purpose of Responsents' second distinction was as a vehicle to get before the Court a written report of a unilateral post suspension hearing conducted without participation by Dr. Peacock or his counsel at a time when Dr. Peacock had on appeal the question of whether a post suspension hearing met the requirements of the *Fourteenth Amendment*. The report itself, at pages A-15 and A-16 of Respondents' Opposition, states that the Committee had been notified three times that Dr. Peacock and his counsel would not participate in such a post suspension hearing until the federal courts finally ruled on the question of whether a person's *Fourteenth Amendment* protected interests could be taken without a pre-suspension hearing and the *Fourteenth Amendment* satisfied by a post-suspension hearing. For Respondents to attach to their opposition in the Supreme Court of the United States the said written report of a hearing conducted while this appeal was pending, whose legality was being challenged in this appeal, and in which Dr. Peacock and his counsel declined to participate pending the determination of this appeal, is an eloquent testimonial to the poverty of Respondents' opposition. Furthermore, the hearings upon which Respondents rely did not even

deal with the question of Dr. Peacock's suspension on May 7, 1974. Rather the notice of charges by Respondent expressly referred to Dr. Peacock's removal as Head "on October 25, 1973." Also, the Court is invited to compare the element of procedural due process requiring specific charges with the two charges that "the clinical department heads at the College of Medicine lost *trust and confidence* in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the *good of the University of Arizona* College of Medicine", and that "in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large [he] conducted the affairs of the Department of Surgery in an *unprofessional manner* inimical to the *best interests of the College of Medicine*." (See Appendix A herein).

Finally, an adequate remedy at law in the form of money damages is no defense to injunctive relief and reinstatement where one has been denied a constitutional right. A district court has no discretion to deny relief by preliminary injunction to a person who clearly establishes that he or she has been denied a constitutional right. *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 634 (4th Cir. 1960); *Bravo v. Board of Education*, 345 F. Supp. 155, 159 (N.D. Ill. 1972). That is, the deprivation of a constitutional right establishes automatically immediate and irreparable harm. *Brass v. Hoberman*, 295 F. Supp. 358 (S.D. N.Y. 1968); see *Board of Supervisors of Louisiana State University v. Wilson*, 340 U.S. 909, *aff'g*, D.C., 92 F. Supp. 986. "Extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human [civil] rights." *Clemons v. Board of Education*, 228 F.2d 853, 857 (6th Cir. 1956).

CONCLUSION

A writ of certiorari should issue.

Respectfully submitted,

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[APPENDIX FOLLOWS]

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APPENDIX A

Notice of Hearing of the Committee On Academic Privilege And Tenure, July 3, 1974..... A-1

APPENDIX A

COMMITTEE ON ACADEMIC PRIVILEGE AND TENURE

The University of Arizona

July 3, 1974

NOTICE OF HEARING

A hearing will be convened at 1:00 pm on Wednesday July 3, 1974 in the Moot Court Room, ground floor, College of Law in response to the request dated May 9, 1974 by President Schaefer regarding the removal of Dr. Erle Peacock as Head of the Department of Surgery. With the consent of the counsel for the appellant (the University administration), this hearing will be open to the public.

Rules of procedure are set forth in the Faculty Manual, Thirteenth Edition, Bylaw 12b (ii), pages 70-71, especially Items (a) through (i), except that by agreement among the parties in the pre-hearing conference of June 7, 1974, the requirement for twenty days' notice is waived.

According to documents filed on June 17, 1974, by Messrs. Jones and Rappeport, the University of Arizona administration charges:

1) that Dr. Erle E. Peacock, Jr. was removed as Head of the Department of Surgery on October 25, 1973 because he acted unilaterally and independently as a clinical department head and without regard for the impact of the results of his actions on his colleague clinical department heads and on the institution

(University of Arizona College of Medicine) as a whole. As a result of the foregoing, the clinical department heads at the College of Medicine University of Arizona lost trust and confidence in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the good of the University of Arizona College of Medicine.

2) that Dr. Erle E. Peacock, Jr. in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large conducted the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine.

/s/ David L. Hetrick
David L. Hetrick
Chairman

cc:

Mr. Jeremy E. Butler	Dr. Erle Peacock
Mr. Ray Davis	Mr. Jack Rappeport
Dr. Merlin DuVal	Dr. John Schaefer
Mr. William Jones	Dr. Raymond Thompson
Mr. William McLane	Dr. Willard Van Slyck
Dr. Donald Myers	Dr. Albert Weaver